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IN THE

Supreme Court of the United States

Nos. 403, 404.

GEORGE ASHWANDER, *et al.*,

Petitioners,

v.

TENNESSEE VALLEY AUTHORITY, *et al.*,

Respondents.

BRIEF OF AMICUS CURIAE, WITH PETITION AND NOTICE.

LAWRENCE C. JONES,
As Attorney General of the State of Vermont, As Amicus Curiae.

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Respondents.

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Please take notice that the undersigned as Attorney General of the State of Vermont, interested in the constitutional questions involved in the above entitled suit, will move this Court at the hearing of this case on the 19th day

of December, 1935, for leave to file a brief as amicus curiae, and for such other or further relief as may be proper.

December 17th, 1935.

LAWRENCE C. JONES,
As Attorney General of the State of Vermont, As Amicus Curiae.

To MESSRS. JAMES M. BECK
and FORNEY JOHNSTON,
Attorneys for Petitioners;
HON. STANLEY REED,
Solicitor General of the United States,
Attorney for Respondents.

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Supreme Court of the United States

Nos. 403, 404.

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TENNESSEE VALLEY AUTHORITY, *et al.*,

Respondents.

PETITION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The Attorney General of Vermont respectfully petitions this Honorable Court for leave to file a brief amicus curiae on behalf of the State of Vermont in the above entitled suit.

Your petitioner applies as Attorney General of the State of Vermont. The State is vitally interested in the preservation of its right as proprietor in trust for its people, of the waters of the navigable streams of the State, subject only to the paramount right of Congress under the Commerce Clause to adopt legislation which has a positive relation to the improvement of navigation, and is vitally interested in protecting the State from indefinite and progressive commercial encroachments by the Federal Government.

Under the contention of the Tennessee Valley Authority on this record, the Federal Government, as a result merely of the erection of a navigation or flood control dam, would

acquire a proprietary right not only to prevent the State and its citizens from utilizing the surplus waters of the Tennessee, admittedly not required for manipulation in the regulation of navigation; but the right as well to utilize such surplus waters for the direct commercial manufacture and sale of electricity by the government and its withdrawal from the state without the consent of the State, without revenue to the State, and without regulation by the State of the commercial utility service thus superimposed upon a navigation improvement.

Vermont lies between Passamaquoddy and the proposed power development on the St. Lawrence and does not care to delegate the regulation of utility rates and service to be broadcast from those sources, to the Federal Government.

By Section 13 of the Tennessee Valley Authority Act authority is given to TVA to make revocable donations to the States of Tennessee and Alabama based on varying percentages of the commercial power to be manufactured and sold by the Government within these States. No such provision is proposed as to the State of Kentucky as to any commercial power to be manufactured by the Government at Aurora Landing or at any power dam to be erected on any of the other rivers within that State. This is a decisive illustration of the untenable basis of the entire program.

Aside from this evidence of discrimination, the State of Vermont is vitally interested in the preservation intact of its traditional sovereign proprietorship in the navigable waters of the State and in its right to look for public revenue to the taxation of the production of hydro-electric energy (*Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *South Carolina Power Company* v. *Tax Commission*, 52 Fed. (2d) 515) within the State, to the taxation of plants and systems for transmission and distribution of electricity, and of its sovereign right to provide for the regulation of utility service.

The opinion of the Circuit Court of Appeals on this record, unless reversed, would establish a precedent that would transfer to the Federal Government proprietary control over the entire undeveloped water power of the nation, amounting to two hundred seventy-five billion kilowatt hours annually, as compared with the total electric power production in the United States in 1929 of eighty-seven billion (National Power Survey, Fed. Pow. Comm., Interim Report Power Series No. 1, 1935).

It is submitted that this result is in consistent with the traditional decisions of this Court in

(1) The basic cases:

Pollard v. *Hagan*, 3 How. 212;
Shively v. *Bowlby*, 152 U. S. 1;
Port of Seattle v. *Oregon-Washington Ry.*, 255 U. S. 56;

(2) The interstate cases:

Kansas v. *Colorado*, 185 U. S. 208; 206 U. S. 46;
Wyoming v. *Colorado*, 259 U. S. 419; 260 U. S. 1;
Connecticut v. *Massachusetts*, 282 U. S. 660;
New Jersey v. *New York*, 283 U. S. 336;

(3) Principle recognized as of course, subject only to control by the government having a positive relation to navigation, in the leading cases of

U. S. v. *Rio Grande, etc., Co.*, 174 U. S. 690, at p. 709;
Wisconsin v. *Illinois*, 278 U. S. 367;
U. S. v. *West Virginia*, 79 L. ed. 848;
U. S. v. *Arizona*, 55 Sup. Ct. 666, 79 L. ed. 681.

It attempts by a false national synthesis to settle finally by transfer to the Federal Government the principle of proprietary ownership within the State recognized in the Kaukauna Case (142 U. S. 254) as well as the equitable rights as between the States fully recognized in the interstate cases above mentioned.

The case is of too grave importance to be left to an opinion disposing of the subject in a single paragraph, without analysis or recognition of its momentous character, based upon citations which in no sense support the conclusion announced.

Notice of this application has been served on counsel for the respective parties in the above-entitled suit. This motion is accordingly respectfully submitted for the consideration and action of the Court.

December 17, 1935.

LAWRENCE C. JONES,

Attorney General of the State of Vermont, as Amicus Curiae.

I.

STATEMENT.

The opinion of the Circuit Court of Appeals contains this statement (Record, pp. 1306-7):

> "The Government by virtue of its lawful ownership of Wilson Dam owns also the water power inevitably created by the construction of that dam. *Kaukauna Co.* v. *Green Bay &c. Co.*, 142 U. S. 254; *Green Bay &c. Co.* v. *Patten Paper Co.*, 172 U. S. 58; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. Congress, in the exercise of its power, under Art. IV, Sec. 3, cl. 2, of the Constitution, to dispose of property belonging to the United States, may dispose of water power created at Wilson Dam as freely as it may of any other Government property. It never heretofore has been held that the right of disposal exists only as to such part as is accidentally produced in excess of the amount strictly necessary for purposes of national defense or of navigation; but always that right has been supposed to extend to all the excess or surplus. Water power is property *sui generis;* unlike most other forms of property,

it cannot be put away and kept for future use or sale, but it must be either converted into electricity and used up as it is released from storage or allowed to go to waste. If the water stored at Wilson Dam is permitted to pass through the penstocks, in the language of counsel for TVA, 'there is gold in it,' but if allowed to flow unhindered over the dam 'it is gone forever.' As a practical matter there would be no market for the incidental or accidental surplus created in the honest effort to produce only enough electricity to supply strictly governmental requirements; for no user, public or private, of electricity would become a customer unless assurance could be given of a firm and dependable supply. That the surplus or any of it need not be allowed to go to waste, but that it and all of it may rightfully be disposed of and the proceeds applied toward reimbursement of the cost of a publicly-owned dam is well settled. *Kaukauna Co.* v. *Green Bay &c. Co., supra; United States* v. *Chandler-Dunbar Co., supra; Arizona* v. *California,* 283 U. S. 423."

The necessary interpretation or implication of the conclusion stated is that whenever and wherever the government of the United States constructs a dam for the improvement of navigation under the authority of the Commerce Clause, it becomes by virtue of that construction vested with a proprietary right to use the impounded waters in the process of commercial manufacture of electricity without reference or relation to the regulation of navigation, and may exclude the States and their grantees from the utilization of the surplus waters not necessary to be manipulated in furtherance of navigation.

The term surplus water used in the connection with navigation improvements means necessarily that water which is not necessary to be manipulated in furtherance of navigation. The conclusion of the Circuit Court of Appeals is that such surplus water is a commodity in which the government of the United States has a proprietary interest, that it can process that commodity through turbo-generators in the

manufacture of electricity, and market the resulting power as a proprietary right of the government.

This conclusion is conceived by the undersigned to be unwarranted and unsound, is contrary to settled adjudications of this Court, misinterprets the effect of the cases cited in the above quoted extract from the opinion, and will, unless reviewed and corrected by the Supreme Court in this proceeding, gravely and adversely confuse and affect the sovereign rights of the States and of the people established by the Constitution.

The conclusion of the Circuit Court of Appeals plainly supports the alleged right of the government not only to preëmpt and utilize all of the waters of a navigable stream for commercial production of power or other commodity, resulting in a denial of the rights of the States to utilize their equitable share of that part of the running waters plainly and admittedly not necessary to be controlled or manipulated in the regulation of navigation, but sustains the alleged right of the federal government not only to utilize such surplus nonnavigation water in a distinct process of manufacturing a commodity (*Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165), but to establish and maintain throughout State domain and for nonfederal purposes, a permanent business for the disposal of the commodity in competition with the State or citizens under and subject to regulation by the State in the disposal of the commodity.

Attention is directed to the fact that the Administration has committed itself, as a matter of negotiation, to the asserted right of the State of New York to the perpetual ownership in trust of the bed, waters and intrinsic water powers of the St. Lawrence River within its jurisdiction, subject only to the right of the United States to regulate the flow of the waters in the interest of navigation.

In the report from the Committee on Foreign Relations relative to the St. Lawrence Treaty, submitted to the Senate under date February 21, 1933 (Senate, Executive Report

No. 1, 72nd Cong., 2nd Sess.), there was contained the following (p. 4):

> "The State of New York claims to be entitled to the one-half of the power developed in that section of the river, and your committee is of the opinion that it should be accorded the same upon the payment of so much of the total cost of the improvement therein as is justly allocatable to power development."

This recommendation has been made effective by the agreement to that end of the Administration, as shown by Joint Memorandum U. S. Engineers and New York Power Authority, Feb. 7, 1933, approved both by the present and the preceeding Administrations. See House Report No. 49, April 20, 1933; also H. J. Res. 157, 73rd Cong., 1st Sess., which passed without amendment April 26, 1933 (Cong. Rec., p. 2441). The resolution did not go to vote in the Senate for the reason that the St. Lawrence Treaty failed of ratification and final legislative approval of the agreement with the State of New York was not necessary, but the Senate Committee on Foreign Relations under date February 21, 1933, Executive Report No. 1, 72nd Cong., 2nd Sess., had already recommended acquiescence."

See **Appendix** hereto for excerpts.

The States should not be compelled thus to negotiate for that to which they are of right entitled. The conclusion reached by the Circuit Court of Appeals is contrary to the negotiated understanding reached with the State of New York, contrary to the rights recognized in the States under the Colorado River Compact.

By Section 13 of the Tennessee Valley Authority Act, wholly inadequate recognition of the injury to the sovereign rights of the States is made by the revocable provision for the payment of a stipend to the States of Tennessee and Alabama, for the loss of their water powers.

The principle of exclusive federal control asserted by the

Circuit Court of Appeals takes no cognizance of any right whatever of the States. Section 13 of the Act is a mere matter of grace to silence for the time being the protests of the subsidized States.

PROPOSITIONS AND AUTHORITIES.

A.

WHERE A QUESTION IS GENERALLY RECOGNIZED AS AND IS ON ITS FACE OF VITAL PUBLIC IMPORTANCE, THE FACT THAT ITS IMMEDIATE INCIDENCE IN A CASE AT BAR IS LIMITED TO A SINGLE PROPERTY OWNER WILL NOT DETER THIS COURT FROM CONSIDERING THE QUESTION IN ALL OF ITS BEARINGS.

In *Penna. Coal Co.* v. *Mahon,* 260 U. S. 393, at p. 414, the question involved was the validity of a statute forbidding the mining of coal under private dwellings or streets where the right to mine such coal had been reserved in the grant. That case directly involved the right of a single land owner, but the Court asserted that in view of the public interest involved and represented, it was the duty of the Court to go farther in the statement of its opinion in order that it may be known at once and that further suits should not be brought in vain, and the Court accordingly proceeded to announce the conclusion that the Act could not be sustained either as an exercise of the police power for the protection of private owners of surface lands or in so far as it affected the mining of coal under streets or cities.

In the pending case the Circuit Court of Appeals has apparently rested its entire conclusion upon the hypothesis of proprietary ownership and control of impounded waters without relation to their bearing upon navigation. Enlarging this proprietary right into a right of manufacture, the Circuit Court of Appeals in effect deals with this right

as a commodity to be processed and disposed of under the Property Clause of the Constitution.

It is obvious that this is a proposition that is absolutely fundamental and so contrary to established constitutional principles that it should not be acquiesced in, although not presented in a cause in which the sovereign state is asserting its proprietary right to make use of the surplus waters.

The proprietary right claimed by the government and approved by the Circuit Court of Appeals is the basis of the competitive manufacture and distribution complained of by the utility, and plainly presents the question which the States might also in a proper case challenge.

The other phase of proprietary action directly challenged on this record and not considered by the Circuit Court of Appeals in its opinion is likewise a matter of the gravest interest and concern to all of the States in their sovereign capacities. We refer to the asserted right of the government (TVA) to make use of an alleged raw material owned or seized by the government (in this case, water for the turbines or coal purchased for the steam plants) in a manufacturing process for the commercial production of a commodity to be used in turn as the basis for a continuous commercial business conducted wholly within State domain in competition with the State or its citizens.

It is respectfully submitted that the federal government has no such right, that there is no warrant for the asserted power in the federal Constitution, and that it is an unprecedented suggestion to contend that the ownership of minerals or raw materials on and within public domain justifies commercial production and manufacture of a finished product for the purpose of engaging in a permanent, region-wide or nation-wide business of distribution in competition with the State or its citizens, whether the manufacturing power (water or coal) be owned as of right or usurped.

It is respectfully submitted that these questions are

plainly of supreme and transcendent importance, and that they fall clearly within the principle of consideration and decision so admirably responded to by the Court in announcing its conclusions in *Penna. Coal Co.* v. *Mahon, supra.*

B.

THE SETTLED DECISIONS OF THIS COURT ARE OPPOSED TO THE CONTENTION OF THE TENNESSEE VALLEY AUTHORITY AND THE CONCLUSION OF THE CIRCUIT COURT OF APPEALS TO THE EFFECT THAT THE FEDERAL GOVERNMENT ACQUIRES A PROPRIETARY RIGHT IN THE WATERS OR IN THE USE OF WATERS IMPOUNDED BY NAVIGATION DAMS.

That no such proprietary right exists is, we submit, axiomatic.

Shively v. *Bowlby*, 152 U. S. 1;
Pollard's Lessees v. *Hagan*, 3 How. 212;
Port of Seattle v. *Oregon-Washington Ry.*, 255 U. S. 56.

The decisions cited are merely outstanding representatives of a long and unbroken line. In the Port of Seattle Case, the court said:

> "The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right Washington became, upon its organization as a State, the owner of the navigable waters within its boundaries and of the land under the same (*Weber* v. *State Harbor Comrs.*, 18 Wall. 57, 21 L. Ed. 798). • • • **The character of the State's ownership in the land and in the waters is the full proprietary right.** The state, being the absolute owner of the tide lands and of the waters over them, is free, in conveying tide lands, either to grant with them rights in the adjoining water area, or to completely withhold all such rights.

> Whether a conveyance made by the State of land abutting upon navigable water does confer upon the grantee any right or interest in those waters or in the land under the same, is a matter wholly of local law. *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. Ed. 331, 14 Sup Ct. Rep. 548."

The Attorney General of the United States made no such contention as is asserted on behalf of the Tennessee Valley Authority and approved by the Circuit Court of Appeals, in the recent suits against the State of Arizona and the State of West Virginia.

U. S. v. *Arizona*, 79 L. Ed. Adv. Op. 681, 685; 55 Sup. Ct. 666;
U. S. v. *West Virginia*, 79 L. Ed. Adv. Op. 848.

In *Wisconsin* v. *Illinois*, 278 U. S. 367, the Court decisively denied the right of the federal government to control or divert navigable waters for purposes other than the regulation of navigation. The conclusion of the Circuit Court of Appeals is plainly inconsistent with one of the epochal decisions of this Court, *Kansas* v. *Colorado*, 206 U. S. 89, which stands today undiminished in authority. The principle of decision in that case was recognized by its citation in the Boulder Dam Case (*Arizona* v. *California*, 283 U. S. 426), and the citation of the latter by the Circuit Court of Appeals as authority for its conclusion, inconsistent with *Kansas* v. *Colorado*, cannot, we submit, be justified.

The claim of a proprietary right in running waters asserted by the Tennessee Valley Authority is an exact repetition of the argument asserted in *Kansas* v. *Colorado* for the right to utilize the waters of the Arkansas River for purposes of reclamation. The Court stated:

> **"This very matter of the reclamation of arid lands illustrates this: At the time of the adoption of the Constitution, within the known and conceded limits of the United States there were no large tracts of arid land, and nothing which**

> **called for any further action than that which might be taken by the legislature of the State in which any particular tract of such land was to be found; and the Constitution, therefore, makes no provision for a national control of the arid regions or their reclamation. But, as our national territory has been enlarged, we have within our borders extensive tracts of arid lands which ought to be reclaimed, and it may well be that no power is adequate for their reclamation other than that of the national government. But, if no such power has been granted, none can be exercised."**

The assertion of proprietary right claimed by TVA is much less justified from a federal-function standpoint than was the claim asserted on behalf of arid federal domain in *Kansas* v. *Colorado*. In that case water was indispensable to reclamation. In this case power production on a commercial scale (beyond the fragment necessary to the actuation of the locks) is wholly unnecessary to the function of navigation.

Pointing out that the right of legislation as to territories gave Congress full municipal jurisdiction within a territory, but that, as to the public domain within the confines of the states, legislation for the national domain could not override state laws in respect to the general subject of reclamation even in those states where the need was urgent, it was in this connection that the Court made use of the expression quoted in the *Burley Case,* 179 Fed. 1:

> "It would be strange if, in the absence of a definite grant of power, the national government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within their borders,"

and continued with this pregnant expression, citing with full approval *Pollard* v. *Hagan, Shively* v. *Bowlby,* and citing the First Green Bay Case (*Kaukauna Water Co.* v. *Green Bay Canal Co.*), 142 U. S. 254, as an authority **relating solely to the question of local law:**

"But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

C.

THE CIRCUIT COURT OF APPEALS HAS MISCONSTRUED THE DECISIONS IN THE GREEN BAY CASES AND THE CHANDLER-DUNBAR CASE.

The certainty of this conclusion does not require an elaboration of the analysis of the decisions. It is sufficient to point out that the line of cases referred to in the proposition, properly construed, afford no basis whatever for the conclusion announced by the Circuit Court of Appeals.

(1) *Kaukauna Water Co.* v. *Green Bay Canal Co.*, 142 U. S. 254, was predicated upon the fact that under the law of Wisconsin the riparian proprietor owns the bed of the stream, that the State had recaptured and held the title to the bed, and all proprietary rights, and had granted them to the predecessor of the Green Bay Company, whose rights were sustained in the case cited.

(2) Precisely the same decisive question underlay the decision in the second Green Bay Case (*Green Bay Canal Co.* v. *Patten Paper Company*, 172 U. S. 58).

(3) In the *Chandler Dunbar Case*, 229 U. S. 53, the Company which failed to sustain its right to compensation for the element of water power value in the bed and banks of the river, lost that claim not because the federal government **owned the water power as such** or the right to the power or to the water or to any surplus water or any right, except the right to manipulate it **for navigation alone**, but did have the full right to prevent Chandler-Dunbar from erecting, at any part of the bed of the stream owned by it, a power structure. Hence, there was no value in a water power which could not be utilized except by an obstruction to interstate

commerce which the government had affirmatively decided against.

Any further decision on that question was plainly obiter and obviously references to cases sustaining the proprietary right of the State, unquestionably vested in the State under the doctrine of *Pollard's Lessees* v. *Hagan,* are inappropriately cited as authority or as an analogy in interpreting the power of the federal government over navigation under the Commerce Clause.

The opinion and conclusion of the Circuit Court of Appeals, confusing and misapplying these principles, are of grave importance and require clarification in the public interest.

This Court knows judicially that there is pending with the present Administration a plain determination to assert proprietary jurisdiction in the federal government over all running waters, on the theory that their control directly affects navigation, whether they constitute navigable waters or not. This theory extended to its logical conclusion would confer jurisdiction upon the federal government over the waters of every spring and mountain branch. Consideration of that question is not involved on this record, but there is involved an erroneous pronouncement by the Circuit Court of Appeals of a proprietary right which is plainly erroneous, misleading and mischievous.

Since it is asserted as the basis for commercial competition with the utility whose rights are directly involved, the principle misapplied in arriving at that result should, we submit, be considered on this record, and the traditional and established conclusion asserted that the function of navigation confers no proprietary rights whatever in the federal government to utilize surplus waters not required to be manipulated in the regulation of navigation for the purpose of engaging in a commercial business throughout state domain.

D.

THE CONTENTION CANNOT BE SUSTAINED THAT THE FEDERAL GOVERNMENT HAS THE RIGHT UNDER THE COMMERCE CLAUSE TO EXTRACT FROM THE WATER COURSES OF A STATE AND ITSELF APPROPRIATE THE MOST VALUABLE NATURAL ASSET IN A STREAM, VIZ., ITS WATER POWER, UNDER PRETENSE OF REGULATING NAVIGATION.

This proposition carries its own obvious justification.

It is incredible that a stream having large value to the State from some inherent element having no positive relation to navigation, such as availability for irrigation through surplus waters having no positive relation to requirements of navigation, or water power incident to the rapid fall of the stream in its natural condition, can be stripped of this inherent natural value merely in order to enable the government by the seizure of these elements of value to reimburse the Treasury for navigation improvements.

The effect of any such notion is merely to appropriate an asset of the State or of its grantees in order to reimburse the Federal Treasury for some supposedly national improvement in furtherance of navigation.

The violation by that doctrine of the Fifth and Tenth Amendments is self-obvious.

This Court definitely decided in the first Green Bay Case (*Kaukauna Water Co.* v. *Green Bay Canal Co.*, 142 U. S. 254) that the proprietary control of the water rights did not follow as an incident to the erection of a navigation dam. On the contrary, it expressly decided that it was necessary for the State which had erected the dam to acquire these water rights by condemnation, and the only question decided was that the condemnation of the water rights would, in accordance with the Constitution and decisions of the State of Wisconsin, constitute a public purpose authorizing con-

demnation by the State, and was therefore not in violation of the Fourteenth Amendment.

That decision is not only not authority for the contention of the Circuit Court of Appeals, but it is express authority to the contrary.

The second Green Bay Case (*Green Bay Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58) was decided necessarily on the strength of the proprietary right in the water power (that is, right to control the waters for the creation of power at the dam in question) which had been absolutely acquired by the State and in turn passed on to the Green Bay Company. That circumstance settled for all time as between all owners of banks and beds on the Fox River the right to use the water power passing the navigation dam at that point. The statutory procedure approved by the Court in the first Green Bay Case and adhered to in the second Green Bay Case, was sufficient as a condemnation of all water rights **throughout the stream** in so far as they were reasonably necessary or desirable to be used in the creation of water power at the dam site in question. The right to develop the water power, **so far as the water rights are concerned,** was referable to the condemnation. So far as the dam is concerned, it makes no difference whatever whether the right was reserved by the Green Bay Company, or whether the fiction of conveyance to the Government and reconveyance by it is adopted.

Hence, when the Patten Paper Company and other riparian and bed owners below the dam complained of the concentration of waters by the Green Bay Company at the dam for the generation of power, it was perfectly obvious that all such rights had been long since condemned.

Under these circumstances, the superior right of the Green Bay Company as between riparian proprietors upstream and downstream, was referable to the absolute title which the Green Bay Company had acquired.

On rehearing (173 U. S. 179), the Court was careful to point out that after the power had been extracted from

the water at the dam, it would not be assumed that the government officials would thereupon undertake so to dispose of the waters of the stream, as they emerged from the tail race, as to affect adversely the rights of any owners of lands in the respective channels in which those waters had been accustomed to flow below the dam.

The erroneous application of these cases has been directly and decisively disposed of in the case of *Wisconsin* v. *Illinois,* in which it is asserted that the right of Congress over navigable waters must have a positive relation to the regulation of navigation, and cannot be exerted where the dominant and primary purpose of the diversion or control is some non-federal objective such as the disposal of sewage or the creation of water power.

E.

THE GOVERNMENT HAS NO RIGHT TO CONDEMN EITHER WATER RIGHTS OR LANDS OR NAVIGATION DAMS FOR PURPOSES NOT HAVING A POSITIVE RELATION TO A SUBSTANTIVE FEDERAL PURPOSE, AND CAN NOT, ACCORDINGLY, ACQUIRE OR CONDEMN WATER RIGHTS FOR THE PURPOSE OF ENGAGING IN COMMERCIAL MANUFACTURE OF ELECTRICITY FOR NON-FEDERAL PURPOSES.

This proposition is fully sustained by the acceptance in *Brown* v. *United States,* 263 U. S. 78, 83, of the opinion of the Supreme Court of Massachusetts in the opinion *In re Opinion of Justices,* 204 Mass. 607, 27 LRA (N. S.) 483. This opinion was extended and restated in *In re Opinion of Justices,* 204 Mass. 616, 91 NE 578, and was again considered and applied in *Salisbury Land & Improvement Co.* v. *Commonwealth,* 215 Mass. 371, 46 LRA (N. S.) 1195.

The same doctrine has been definitely stated and applied in *Richmond* v. *Carneal,* 129 Va. 388, 14 A. L. R. 1341, and finds support in the traditional statements of the limitations upon governmental authority set out in I Lewis

Eminent Domain, Sec. 1; Cooley, Constitutional Limitations, 6th Ed., p. 651; Nichols Eminent Domain, p. 178.

Under these circumstances it is denied categorically that the government of the United States has any right to acquire lands beyond and in addition to those necessary for the governmental purpose in order to subject them to perpetual commercial use with the idea of reimbursing the Treasury for a federal expenditure.

This precise contention was adequately considered and denied in the cases cited.

There is nothing in the Green Bay Cases which remotely justifies a contrary conclusion.

In *Brown* v. *United States,* 263 U. S. 78, the Court sustained the right to acquire property not attingent upon the stream or affected by the proposed floodage of the irrigation improvement, where acquired for the express purpose of exchanging lots with the owners of property attingent upon the stream whose holdings would be flooded by the improvement. This was a mere determination that this method of dealing with a complicated problem of compensation by relocation had a reasonable relation to the governmental purpose intended, a conclusion which was obviously sound; but the case does not take issue with—on the contrary it accepts—the conclusion of the Massachusetts court and plainly distinguishes between the peculiar circumstances presented in the Brown Case and the idea of commercial operations in order to reimburse the Treasury.

In the Brown Case the Court asserted that its conclusion is not sought to be justified only as a way for the United States

> "to reduce the cost of the improvement by an outside land speculation."

In the case at bar the effort is sought to justify the usurpation of the water rights (without condemnation) in an outside speculative conduct of the commercial business of power manufacture and distribution.

In the Brown Case, the Court asserted that the "transaction is not properly described as the condemnation of land of one private owner to sell it to another. The incidental fact that in the substitution and necessary adjustment of the exchanges a mere residuum of the town-site lots may have to be sold does not change the real nature of what is done, which is that of a mere transfer of the town from one place to another at the expense of the United States."

Obviously *Brown* v. *United States* is no authority for the contention that the government could occupy the residuum of lots held as a result of the acquisition of the substitute plat for the purpose of establishing a plant for the commercial manufacture of electricity, in order to liquidate the cost of the irrigation project.

F.

THERE WAS SPECIFIC RECOGNITION BY THE FEDERAL POWER COMMISSION IN ITS RESPONSE DATED MAY 15, 1926, TO THE HON. CHAS. E. HUGHES, AS COUNSEL FOR THE STATE OF NEW YORK, THAT THE FEDERAL GOVERNMENT HAD NO RIGHT TO OPERATE COMMERCIALLY THE POWER INSTALLATIONS MADE IN A NAVIGATION DAM, WHEN AND IF RECAPTURED UNDER THE FEDERAL WATER POWER ACT.

The correspondence between the Attorney General of New York through Hon. Charles E. Hughes, as counsel, and the Federal Power Commission, is of impressive significance in this matter. It is set out in full beginning at page 155 of the Sixth Annual Report of the Federal Power Commission—1926.

From that correspondence, we excerpt a single significant paragraph:

"With respect to the derivation of revenues from the project: The commission has made no attempt

and proposes to make no attempt in this or in any other case to collect charges for revenue purposes. It is, furthermore, of the opinion that no provision of the Federal water power act gives it authority to do so. It is likewise of the opinion that the extent to which and the manner in which the State of New York may collect revenues from power projects within that State, whether such projects are or are not licensed under the Federal water power act, is a matter to be determined wholly by the constitution and laws of that State; and that nothing in the Federal water power act, or in the regulations promulgated thereunder, or in the licenses issued thereunder, adds to or subtracts from this right of the State.

"With respect to the provisions of the license and of the law concerning 'recapture': It is the opinion of the commission that the provisions of section 14 of the Federal water power act respecting acquisition by the United States of properties under license are not, and were not intended to be, of themselves, a grant of authority to acquire such properties for the United States. It seems elementary that the United States may acquire private **property only for a public use, and that what constitutes a public use must be interpreted in the light of the constitutional powers of Congress as possessed at the time the property is to be taken.** Unless during the next 50 years Congress shall be given, **through amendment of the Constitution,** authority to acquire property for purposes not now authorized its right of recapture when a license expires will be limited to the same purposes for which such right might now be constitutionally exercised, namely, for governmental purposes. Furthermore, in order to make exercise of the right effective, an appropriation of moneys must be made and such appropriation, since it requires action by Congress, will likewise require the approval by Congress of the proposal to acquire at the time when the acquisition is proposed to be made. In case, therefore, of recapture for a constitutional purpose under the terms of the Federal water power act of properties licensed under that act the only real relation to the transaction of the provisions of that act would appear to be in determining the price to be paid for the properties."

G.

WITHOUT REFERENCE TO THE ABSENCE OF ANY PROPRIETARY RIGHT OF THE UNITED STATES IN SURPLUS WATERS, THE PROGRAM OF COMMERCIAL OPERATION OF A WAR PURPOSE STEAM PLANT AS A BASIS FOR A GENERAL PROPRIETARY BUSINESS IN STATE DOMAIN IN COMPETITION WITH THE STATE AND ITS CITIZENS IS IN VIOLATION OF THE TENTH AMENDMENT.

The States and all citizens are directly interested in that phase of the record and this proceeding not dealt with by the Circuit Court of Appeals, viz.: the use of the Muscle Shoals steam plant as a source of power for a region-wide utility transmission and distribution system.

In short, whether the government owns coal or oil or buys or, as in the case of the surplus waters not necessary for navigation, appropriates it without right, there is no lawful right in the government to process this source of energy into a marketable commodity for sale by the government for profit or to accomplish the nonfederal legislative, economic or political objectives which constitute the dominant and decisive purpose of the Tennessee Valley Authority program.

H.

SUPERIMPOSING A COMMERCIAL MANUFACTURING AND DISTRIBUTION BUSINESS, PARTICULARLY ONE INVOLVING A MONOPOLY OF UTILITY SERVICE IN THE AREA, UPON AN OSTENSIBLE IMPROVEMENT OF NAVIGATION, IS PLAINLY VIOLATIVE OF THE FEDERAL CONSTITUTION.

We have inspected the brief for the petitioners filed in this case, and affirm on behalf of the States whose interests are vitally involved, that the proposal of the Tennessee Valley Authority sustained on this record by the Circuit

Court of Appeals, would annul the Tenth Amendment so far as the traditional control of the internal affairs of the States with relation to commercial businesses and the regulation of utilities is concerned.

No good purpose would be subserved by a repetition of the controlling authorities dealing with this aspect of the case.

I.

THERE IS A RADICAL DISTINCTION BETWEEN THE REGULATION OF NAVIGATION AND THE PROCESS OF COMMERCIAL MANUFACTURE AND TRANSMISSION OF ELECTRICITY.

The decision of this Court in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, clearly establishes the distinction between the raw material (coal or falling water) utilized as the basis for the manufacture of electricity, the commodity resulting from that manufacturing process, and the subsequent act of transmission. The opinion of the Circuit Court of Appeals does not give effect to these distinctions. The function asserted by the Tennessee Valley Authority within state domain is in its entirety proprietary and non-governmental.

In *Twin Falls Canal Co.* v. *Foote*, 192 Fed. 583, 594, the Court said:

> "In prosecuting such an enterprise (reclamation project), however, it (the United States) is not primarily performing a governmental, or, strictly speaking, even a public function, but is promoting its proprietary interests. Such advantage as arises therefrom to the people at large is material and not governmental, and is only such as might indirectly accrue to the public from the reclamation of an equal amount of land through private enterprises. *Kansas* v. *Colorado*, 206 U. S. 46, 92, 27 Sup. Ct. 655, 51 L. Ed. 959; *United States* v. *Hanson*, 167 Fed. 881, 93 C. C. A. 371; *United States* v. *Burley*, 172 Fed. 615, Id. 179 Fed. 1, 102 C. C. A. 429."

The functions are as clearly commercial and proprietary on part of the United States as were the functions considered in the State business cases from the standpoint of federal taxation.

South Carolina v. *U. S.*, 199 U. S. 437;
Ohio v. *Helvering*, 292 U. S. 360;
Helvering v. *Powers*, 79 L. Ed. Adv. 141.

The proprietary functions of commercial transmission and distribution within State domain having by express finding of the District Court no relation whatever to war or any federal function, are plainly beyond the lawful scope of the federal government.

That the inevitable and necessary effect of this program of encroachment upon the functions of the State is to dry up the commerce of its citizens and its revenues by withdrawing them from ad valorem and excise taxation, is obvious.

The program involves the breakdown of the powers reserved under the Tenth Amendment.

If the rights asserted on behalf of the government by TVA and sustained by the Circuit Court of Appeals on this record should be affirmed by this Court, then the question whether and to what extent the federal government will under the guise of preparedness for war or overbuilding war plants or navigation improvements, enter into commercial operations in State domain, is left to the discretion of Congress and is no longer protected by the Tenth Amendment. According to the conclusion announced by the Circuit Court of Appeals, any rational means adopted by Congress to provide a market for electricity produced for commercial purposes is within the discretion of Congress. In short, the Government of the United States may not only manufacture electricity for commercial sale at steam-electric or hydro-electric plants, not only may it transmit that electricity throughout State domain and sell it either at wholesale or retail, but it would logically follow that, as plainly inherent in the reserved plans of the Tennessee

Valley Authority, if customers of the power could not otherwise be obtained after driving the State and its citizens out of the market, the Government could subsidize, operate or control any manufacturing plant whatever in order to create a market for its power, by analogy to the decisions of this Court which have authorized the creation of fiscal corporations to provide a market for federal securities.

There is discussed in petitioners' brief the precedent of monopoly statutes enacted to protect the Government from competition in the carriage of the mails (p. 237). If the Government has the right to engage in any such enterprise, there is the grim possibility in the background that it might undertake to make it effective by deciding that the business of State corporations is being "conducted in such a way as to be a menace or obstruction to the legitimate (?) activities of its federal competitors" (referred to arguendo in *Hopkins Fed. Savings and Loan Assn.* v. *Cleary, et al.*, December 9th, 1935, page 10).

Certainly as to utility competition this is not a case where "the two classes of association, federal and state, may continue to dwell together in harmony and order" (ib.). In this case, it is the federal enterprise which is not consistent with the letter and spirit of the Constitution. The encroachment on State function and responsibility exists. A continuing federal commercial power under the guise of navigation corporations or preparedness corporations is not consistent with the American system.

In short, this record presents the complete and final breakdown of the Tenth Amendment. It will be a casus of the first magnitude if the decision of the Circuit Court of Appeals, plainly sustaining any such consequence, should not be reversed.

Respectfully submitted,

LAWRENCE C. JONES,
Attorney General of the State of Vermont as Amicus Curiae.

APPENDIX

I.

H. J. Res. 157, 73rd Cong., Ist Sess. (Report No. 49), introduced by Mr. McReynolds, adopted by the House April 25, 1933 (Cong. Rec., p. 3274), recites:

> "Whereas the State of New York, recognizing the superior rights and authority of the Federal Government with respect to navigation, has presented substantial claims to the power to be developed by the flow of the water of the Saint Lawrence River within its boundaries and, by act of its legislature, has created the Power Authority of the State of New York as a corporate, municipal instrumentality charged with the development and control of the power for the benefit of domestic and rural consumers through distribution at the lowest possible rates; * * *" etc., etc.

and provides that the Power Authority of the State of New York * * *

> "shall be entitled to use for the generation of hydroelectric power all of the United States' share of the flow of the water in the international rapids section of the Saint Lawrence River, subject to the prior use of such water under the treaty for the purposes of navigation and the operation of reservoirs, canals, and locks, and shall have title to the power houses and works appurtenant thereto upon the United States side, together with the lands upon which they are situated, in consideration of the payment of its share of the cost as determined in the joint memorandum above referred to: * * *" etc.

House Report No. 49, 73rd Cong., 1st Sess. (April 20, 1913), by Mr. Rayburn, referring to the contentions of the State of New York, contains the following:

"The results of these conferences were embodied in a joint memorandum, signed by the United States engineers and the Power Authority, under date of February 7, 1933. This memorandum was presented in the form of a joint recommendation to the Senate Committee on Foreign Relations which, in reporting the treaty to the Senate, recommended that the State should be accorded the power to be developed within its boundaries upon assumption of its proportionate share of the cost of the works.

* * * * * *

"The joint resolution simply gives effect to the recommendation of the engineers *approved under both the preceding and present administrations* and, contingent upon ratification of the treaty, erects safeguards against the private exploitation of this great natural resource which is to be developed by the use of public funds."

This refers to concurrence by both the present and the Hoover Administrations.

Senate Executive Report No. 1, 72nd Cong., 2d Sess., submitted February 21, 1933, by Mr. Borah, relating to the Great Lakes-St. Lawrence Deep Waterway Treaty, contains the following:

"The State of New York claims to be entitled to the one-half of the power developed in that section of the river, and your committee is of the opinion that it should be accorded the same upon the payment of so much of the total cost of the improvement therein as is justly allocatable to power development. Of the total cost Canada's expenditure will be $270,976,000; that of the United States $272,453,000. New funds required of this country will amount of $257,992,000 (hearings, p. 11), including the sums to be provided by the State of New York on account of power, which the engineers of the State and those of the War Department have agreed should be $89,000,000."